

The Honorable John H. Chun

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

AMAZON.COM, INC. *et al.*,

Defendants.

No. 2:23-cv-0932-JHC

**DECLARATION OF JOSEPH A.
REITER IN SUPPORT OF
DEFENDANTS' MOTION TO
COMPEL PRODUCTION OF FTC
COMMUNICATIONS AND
INTERNAL DOCUMENTS**

I, Joseph A. Reiter, declare as follows:

1. I am a partner at the law firm Hueston Hennigan LLP, counsel for Defendants Amazon.com, Inc.; Neil Lindsay; Russell Grandinetti; and Jamil Ghani in the above-captioned case. To the best of my knowledge, the matters set forth herein are true and correct and, if called as a witness, I could and would testify competently thereto.

2. I submit this declaration in support of Defendants' Motion to Compel Production of Documents from the FTC and in accordance with the Western District of Washington's Local Civil Rule 37(a)(1). I certify that the parties have met and conferred in good faith, and have exchanged multiple letters, to attempt to resolve the discovery disputes raised in Defendants' Motion to Compel the FTC to Produce Communications and Internal Documents (the "Motion"), as described below.

3. Attached as **Exhibit 1** is a true and accurate copy of Amazon's First Request for Production (hereinafter, "RFP"), dated August 22, 2023.

4. As discussed in the accompanying Motion, Defendants move to request production of the following documents:

- Internal FTC documents reflecting the FTC’s interpretation over time of ROSCA, negative options, and “dark patterns.” *See* Ex. 1, Amazon’s Request for Production (“Amazon RFP”) at Nos. 15, 17, 18, 21, 23, 24, 25, and 26.
- Documents post-dating June 21, 2023 (the date the FTC filed its complaint) that relate to the FTC’s ongoing negative option rulemaking, 88 Federal Register 24716 (hereinafter, the “Negative Option Rulemaking”). *See* Amazon RFP No. 23.
- Documents relating to the FTC’s 2009 report titled “Negative Options – A Report by the staff of the FTC’s Division of Enforcement” and the related workshop discussed in the report. *See* Amazon RFP No. 26.
- Documents in the custody of the FTC’s Office of Public Affairs (“OPA”), including documents relating to the FTC’s press releases about this litigation. *See* Amazon RFP Nos. 1-2, 4, 6-14, 17, 28-30.

A. The Parties’ Meet-and-Confer and Relevant Letter Exchanges

5. The parties have exchanged letters and engaged in a good faith meet-and-confer to discuss issues pertaining to the discovery requests raised in the Motion. The below describes relevant exchanges between the parties:

6. On November 21, 2023, the FTC sent to Defendants a letter via email raising objections to the production of non-public documents responsive to Amazon RFP Nos. 15, 17, 18, 21, 23, 24, 25, and 26. **Exhibit 2** contains a true and accurate copy of the FTC’s November 21, 2023 letter.

7. On December 12, 2023, Defendants emailed the FTC a response. **Exhibit 3** contains a true and accurate copy of Defendants’ December 12, 2023 letter.

8. Among other issues, Defendants objected to the FTC’s decision to withhold responsive materials concerning internal documents, workshops, and rulemaking about ROSCA,

negative options, and dark patterns, *id.* at 5-7. Defendants also requested that the FTC perform a reasonable search for responsive documents at the Office of Public Affairs. *Id.* at 2.

9. On December 14, the parties engaged in a meet-and-confer over Microsoft Teams. Participants to the call included myself, Joseph Aronsohn (Counsel, Hueston Hennigan), Daniel Bernick (Counsel, Covington), Laura Flahive Wu (Counsel, Covington), Kenneth Payson (Counsel, Davis Wright Tremaine LLP), Evan Mendelson (Counsel, FTC), Elena Hoffman (Paralegal, FTC), Johana Meija-Portillo (Paralegal, FTC), Ryan Zwonik (Paralegal, FTC), Jacob Frech (Paralegal, FTC), and Yara Awad (FTC). During the meet-and-confer, the FTC represented that it would consider: (i) Amazon's request for documents post-dating June 21, 2023, including documents relating to the ongoing Negative Option Rulemaking; (ii) Amazon's request for documents relating to the 2009 Negative Options Report; (iii) Amazon's request that the FTC search through the Office of Public Affairs, among other offices; and (iv) revisiting its position on production of non-public documents reflecting interpretations, application, or enforcement of ROSCA, negative options, or dark patterns.

10. On December 22, 2023, the FTC emailed Defendants' counsel a letter responding to Defendants' December 12, 2023 letter and following up on items discussed during the meet-and-confer. **Exhibit 4** contains a true and accurate copy of the FTC's December 22, 2023 letter.

11. In the December 22, 2023 letter, the FTC represented, *inter alia*, the following: (i) that it would not produce any documents post-dating June 21, 2023, but that it "reserved the right to later seek specific documents, or categories of documents, that postdate June 21, 2023" (*id.* at 3, n.1); (ii) that it would not search for and produce documents relating to the 2009 Negative Options Report (*id.* at 7); (iii) that it would not search for responsive documents at the Office of Public Affairs (*id.* at 6); and (iv) that it would only produce FTC internal documents concerning ROSCA, negative options, and dark patterns that pertained to communications with or guidance to third parties, but would not otherwise produce other non-third party related internal documents (*id.* at 6-7).

12. In response, Defendants emailed the FTC a letter, dated January 3, 2024, raising objections to the positions taken by the FTC in its December 22 letter. **Exhibit 5** contains a true and accurate excerpted copy of Defendants' January 3, 2024 letter. The copy excerpts pages 4 to 6 of the letter, which contains information not relevant to the Motion.

13. In the January 3, 2024 letter, Defendants stated that they were willing to agree to a default production cutoff date of June 21, 2023, subject to the FTC producing post June 21, 2023 documents regarding the FTC's ongoing Notice of Proposed Rulemaking regarding its Negative Option Rule. *See* Ex. 5 at 2-3. Defendants also clarified that the January 1, 2013 start date does not apply to RFP 26, which sought documents relating to the 2009 Negative Option Report and reiterated its request for the FTC to search the Office of Public Affairs for responsive documents. *Id.* at 4-6. Finally, Defendants objected to the FTC's position to withhold FTC internal documents concerning ROSCA, negative options, and dark patterns that did not pertain to third parties. *Id.* at 6-7.

14. The FTC emailed Defendants a letter response on January 10, 2024. **Exhibit 6** contains a true and accurate copy of the FTC's January 10, 2024 letter.

15. In the January 10, 2024 letter, the FTC maintained the same positions reflected in its December 22, 2023 letter: (i) that it "would not search for any documents postdating June 21, 2023, including documents relating to the ongoing Negative Option Rulemaking" (*id.* at 4); (ii) that it would not search for documents concerning the 2009 Negative Options Report (*id.*); (iii) that it would not search the Office of Public Affairs for responsive documents (*id.* at 3); and (iv) that the FTC "will not search for, produce, or log documents" reflecting the FTC's internal discussions that do not pertain to communications with third parties (*id.* at 5).

16. For the reasons discussed in the Motion, the FTC must be compelled to produce the requested documents, which it has no basis to withhold.

B. Additional Exhibits to the Motion

17. In further support of the Motion, Defendants submit the following additional exhibits:

18. **Exhibit 7** contains a true and accurate copy of copy of the FTC Staff Report titled “Bringing Dark Patterns to Light,” available at: https://www.ftc.gov/system/files/ftc_gov/pdf/P214800%20Dark%20Patterns%20Report%209.14.2022%20-%20FINAL.pdf. This link was last accessed on February 15, 2024. This document was also included in Defendants’ Request for Judicial Notice in Support of Their Motions to Dismiss the Amended Complaint, Dkt. 87, at Exhibit 13.

19. **Exhibit 8** contains a true and accurate excerpted copy of the FTC’s Supplemental Responses and Objections to Amazon’s First Set of Interrogatories, dated January 23, 2024. Exhibit 8 is excerpted to only include the FTC’s responses to Amazon’s Interrogatory No. 1, which is the only information in that document that is relevant to this Motion.

20. **Exhibit 9** contains true and accurate copy of FTC’s 2009 report, titled “Negative Options – A Report by the staff of the FTC’s Division of Enforcement” (the “2009 Negative Options Report”), which is available at <https://www.ftc.gov/sites/default/files/documents/reports/negative-options-federal-trade-commission-workshop-analyzing-negative-option-marketing-report-staff/p064202negativeoptionreport.pdf>. This document was last accessed on February 15, 2024.

21. **Exhibit 10** contains a true and accurate copy of the FTC’s June 21, 2023 press release titled “FTC alleges Amazon enrolled people in Prime without consent and thwarted members’ attempts to cancel,” which is located at <https://www.ftc.gov/business-guidance/blog/2023/06/ftc-alleges-amazon-enrolled-people-prime-without-consent-thwarted-members-attempts-cancel>. This press release was last accessed on February 15, 2024.

22. **Exhibit 11** contains a true and accurate copy of the FTC’s June 21, 2023 press release titled “FTC Takes Action Against Amazon for Enrolling Consumers in Amazon Prime Without Consent and Sabotaging Their Attempts to Cancel,” which is located at <https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-takes-action-against-amazon-enrolling-consumers-amazon-prime-without-consent-sabotaging-their>. This press release was last accessed on February 15, 2024.

23. **Exhibit 12** contains a true and accurate copy of Volume 88 of the Federal Register (the FTC's Proposed Negative Option Rule), which is available on the FTC's website at <https://www.federalregister.gov/documents/2023/04/24/2023-07035/negative-option-rule>. The link was last accessed on February 15, 2024. This document was also included in the Defendants' Request for Judicial Notice in Support of Their Motions to Dismiss the Amended Complaint, Dkt. 87, at Exhibit 1.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge.

Executed on this 15th day of February, 2024, in Newport Beach, California.



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